

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Waiver of Digital Testing Pursuant)	MB Docket No. 05-317
To the Satellite Home Viewer Extension)	
And Reauthorization Act of 2004)	

**OBJECTION TO COMMISSION CONSIDERATION OF THE “OPPOSITION OF
ECHOSTAR SATELLITE, LLC” AND CONTINGENT CONSOLIDATED
REPLY OF SCRIPPS HOWARD BROADCASTING COMPANY**

Scripps Howard Broadcasting Company (“Scripps Howard”), the licensee of television Stations WEWS-DT, Cleveland, OH; and WCPO-DT, Cincinnati, OH; and the 100% parent company of the licensees of television Stations WXYZ-DT, Detroit, MI; and WFTS-DT, Tampa, FL (together the “Scripps Stations”), through counsel, hereby objects to an unauthorized *ex parte* filing made in this restricted proceeding by EchoStar Satellite, LLC (“EchoStar”). Scripps Howard requests that this filing be separated from the record and not considered absent an affirmative order from the Commission and notice to affected parties. Scripps Howard further requests that should the Commission elect to consider EchoStar’s filing, it also consider the brief consolidated reply of the Scripps Stations that is offered here.

Objection to Consideration of EchoStar’s Opposition

The “Opposition of EchoStar Satellite, LLC,” submitted on December 30, 2005, constitutes a prohibited *ex parte* filing in a restricted proceeding because the pleading included oppositions addressed specifically to the waiver requests of the above-referenced Scripps Stations, but EchoStar never served a copy of this filing on those stations or their counsel. See declaration of Ruth Omonijo, attached. Accordingly, the filing is an *ex parte* presentation as defined in Section 1.1202(b) of the Commission’s rules.

Section 1.1208 of the rules provides that “all waiver proceedings (except for those directly associated with tariff filings)” are “restricted” proceedings in which *ex parte* presentations are prohibited. Section 1.1212 thus directs that EchoStar’s *ex parte* pleading (or at least those sections of the pleading addressing the Scripps Stations’ waiver requests) be separated from the record, and that the separated material be “considered in determining the merits of [this] restricted proceeding only if they are made part of the record and the parties are so informed.” See 47 C.F.R. 1.1212(d).

EchoStar’s violation of the *ex parte* rules is particularly serious given the short statutory deadline for Commission action on these waiver requests and the concomitant delay in completing a proper record for decision. Scripps Howard only received actual notice of EchoStar’s objections to its waiver requests on March 1, 2006. On that date, its counsel reviewed Docket 05-317 after receiving a copy of a filing received from EchoStar that related to the EchoStar Opposition. (This mailed material, that was related to EchoStar’s objections to other stations’ waiver requests, was not received by Scripps Howard’s counsel until February 28, 2006. See Declaration of Ruth Omonijo.)

Request for Acceptance of Scripps Howard’s Reply to EchoStar’s Opposition

Scripps Howard recognizes that, despite EchoStar’s serious procedural lapse, the Commission may choose to make EchoStar’s objections part of the record. Given that the statutory deadline for Commission action on the waiver requests is April 30, 2006, Scripps Howard hereby offers a brief reply to EchoStar’s allegations and asks that its reply be considered in this proceeding if EchoStar’s filing is accepted. As noted above, Scripps Howard lacked actual notice of EchoStar’s Opposition and its specific allegations against the Scripps Stations’

waiver requests until March 1, 2006, after which it promptly prepared and submitted these reply comments that address only EchoStar's specific objections to its waiver requests.

**Consolidated Reply to EchoStar's Objections
To the Scripps Stations' Waiver Requests**

I. The "necessity of using a side-mounted antenna" issue.

Each of the Scripps Stations' waiver requests relies on the ground set out in Section 339(a)(2)(D)(viii)(IV) of the Communications Act that permits waiver for a "station that experiences a substantial decrease in its digital signal coverage area due to the necessity of using a side-mounted antenna." EchoStar objects that the Scripps Stations failed to make a showing by "clear and convincing evidence" that a side-mounted antenna was "necessary" and "unremediable" as required by the statute.

In fact, the Commission's records show that Scripps Howard was an early pioneer in offering high-power digital television service from these stations and that it took extra measures to offer full-power digital service to each of these stations' viewing areas long before any build-out deadline. See, *e.g.*, Scripps Howard's requests for waiver of the replication/maximization interference protection deadline filed for each of the Scripps Stations in MB Docket No. 03-15 on July 1, 2005. Scripps Howard's choice of side-mounted antennas for Stations WEWS-DT, WCPO-DT, and WXYZ-DT (and of an antenna for Station WFTS-DT that unavoidably suffers limited transmission power while mounted on the same tower as the station's analog antenna), was the only rational means available to offer high-power DTV service pending the conclusion of the digital transition when full digital service can be implemented from these towers.

The Scripps Stations' waiver requests explain in each instance why the station cannot remount the digital antenna on the top of its respective tower so as to achieve full coverage (or in the case of WFTS-DT, why it cannot get access to the full power necessary for a maximized

operation). In each case the change would require the unacceptable result of substantially decreasing the analog service relied upon by the vast majority of over-the-air viewers. EchoStar does not dispute that adverse public interest consequences would follow from favoring the maximization of digital coverage at the expense of far more analog viewers, and the Scripps Stations' showings thus do make a clear and convincing case that each station's situation is both necessary and unremediable pending completion of the digital transition. Congress simply could not have intended, as EchoStar insists, that a waiver seeker has the burden to prove that there is no other means possible--irrespective of cost--to deliver maximized DTV service.

II. The "substantial decrease in [the station's] digital signal coverage area" issue.

For three of the stations, EchoStar also disputes Scripps Howard's showings that there would be a substantial decrease in the digital signal coverage area. The required statutory showing involves a station's "coverage area," and this was the technical criterion addressed in the Scripps Stations' waiver requests.

EchoStar's Opposition focuses on population coverage, but, in fact, the population losses for the Scripps Stations shown in EchoStar's own technical exhibit demonstrate how substantial these losses are and thus that the waiver requests are justified under the statutory standard. A simple calculation based on Hammett & Edison's engineering statement (attached to the EchoStar pleading), shows the following population losses that are plainly substantial:

For Station WXYZ-DT, 115,050 persons;

For Station WCPO-DT, 79,836 persons;

For Station WEWS-DT, 146,182 persons; and

For Station WFTS-DT, 22,157 persons.

In addition, as the Commission's technical staff and broadcast engineers know, the Scripps Stations' percentage losses that EchoStar deplores as "insubstantial" and "small" are, in fact, exactly the level of percentage loss that a station would be expected to suffer from side mounting an antenna instead of placing it at the top of the tower. If Congress had intended to require the type of losses that EchoStar suggests would be required to be "substantial," including the "side-mounted antenna" ground for pursuing a waiver request would have served no purpose. More substantial losses are simply not likely to occur as a result of employing a side-mounted antenna, and Congress should not be presumed to have adopted a criterion it did not intend be applied.


Conclusion

For the above reasons, Scripps Howard requests that in accord with the requirements of the *ex parte* rules, the Commission not consider the unauthorized filing described by EchoStar as its "Opposition" in this restricted waiver proceeding without taking the affirmative steps required by the rules. Scripps Howard further requests that if the Commission should consider the EchoStar "Opposition," that it also consider the Scripps Stations' reply contained herein, and that the Commission grant the Scripps Stations' waiver requests.

Finally, for the record, Scripps Howard has authorized its counsel to certify and he hereby that certifies neither the licensees nor any party to the waiver requests is subject to denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862.

Respectfully submitted,

Scripps Howard Broadcasting Company
(Stations WEWS-DT and WCPO-DT)
Channel 7 of Detroit, Inc. (Station WXYZ-DT)
Tampa Bay Television, Inc. (Station WFTS-DT)



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March 6, 2006

DECLARATION OF RUTH OMONIJO

I am employed at the law firm of Baker & Hostetler LLP. I am the assistant to Kenneth C. Howard, Jr., counsel to the Scripps Stations identified in the attached pleading. I have reviewed a copy of the "Opposition of EchoStar Satellite, LLC" that was filed on December 30, 2005. There is no certificate of service associated with the copy of this document that I retrieved from the Commission's CDBS electronic filing system, and I am confident that no copy was delivered to Mr. Howard.

On February 28, 2006, I received via U.S. Mail a copy of a letter to the FCC from EchoStar Satellite, L.L.C. that was dated February 17, 2006. This letter addressed matters in MB Docket No. 05-317, but it did not address the Scripps Stations' waiver requests. Mr. Howard was not included as one of the four counsel listed in the certificate of service attached to this letter, but he was included on a separate list of counsel attached to the letter with the heading: "Copies distributed to:".

I declare that the foregoing is true and correct. Executed on March 6, 2006.


Ruth Omonijo

CERTIFICATE OF SERVICE

I, Ruth Omonijo, of the law firm of Baker & Hostetler LLP, certify that I have caused a copy of the foregoing Objection To Commission Consideration Of The "Opposition Of Echostar Satellite, Llc" And Contingent Consolidated Reply Of Scripps Howard Broadcasting Company to be sent via First Class United States mail, postage pre-paid to the following:

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Ruth Omonijo